Supreme Court, U.S.
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No. 02-1032

IN THE

Supreme Court of the United States

HELEN STACEY,

Petitioner,

v.

CITY OF HERMITAGE and
CITY OF HERMITAGE BOARD OF APPEALS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF HERMITAGE

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QUESTIONS PRESENTED

Whether the City of Hermitage and City of Hermitage Board of Appeals seizure and demolition of Petitioner's property, upon the determination of the Board of Appeals that the property was an attractive nuisance, unsafe for human habitation, littered with rubbish or garbage and uncontrolled weed growth, and in danger of collapse and subsequent to Stacey availing herself of the process of legal review available pursuant to the relevant City ordinances and Pennsylvania law, was reasonable under the Fourth and Fourteenth Amendments?

Whether conduct by the trial judge and civil filing clerk (prothonotary) amounted to a deprivation of procedural due process in violation of the Fourteenth Amendment?

Whether the issues raised by Petitioner Helen Stacey are unripe for disposition by this Court, as such issues are currently pending before the United State District Court for the Western District of Pennsylvania in a case captioned *Stacey v. City of Hermitage, et al.*, No. 02-CV-1911.

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STATEMENT OF THE CASE

In 1997, Respondent, City of Hermitage ("City") provided Petitioner Helen Stacey ("Stacey") notice that real property owned by Stacey (and her now-deceased husband) located in the City was in violation of the City's Property Maintenance Code and therefore, the City was proceeding to have the property determined to be a public nuisance. In 1998, the City adopted a Property Maintenance Code that mirrors the Building Officials and Code Administrators National Property Maintenance Code ("BOCA Code"). Thereafter, the City notified Stacey that her property was in violation of the BOCA Code and that any corrective action was required to be completed within thirty (30) days of the notice.

Stacey appealed to Respondent City of Hermitage Board of Appeals ("Board"). After a hearing held on April 15, 1999, the Board determined that Stacey's property was an unattractive nuisance, unsafe for human habitation, littered with rubbish or garbage and uncontrolled weed growth, a fire hazard and in danger of collapse. Again, Stacey appealed. By Order dated April 19, 2000, the Mercer County Court of Common Pleas, Thomas R. Dobson, Judge ("Trial Court") affirmed the Board's determination in all respects except one. The Trial Court reversed the Board's determination that Stacey's property constituted a fire hazard. Stacey did not appeal from that Order.

Thereafter, the City began proceedings to have the structure demolished. On Jun 1, 2000, the City informed Stacey that she had the right to cure the structure's defects within thirty (30) days of such notice; if no remedies were taken, demolition would follow. Stacey's son, Raymond

Stacey, requested an extension of time in which to make repairs on or about June 30, 2000. By that time, Raymond had distributed two (2) loads of sand into the structure's basement in an attempt to remedy caving caused by previous flooding. No further repairs were undertaken.

On August 30, 2000, Stacey filed a Petition for temporary injunction against the Board and the City. As a basis for that action, Stacey alleged that she was arbitrarily denied a hearing before the Board on the issue of demolition, that she was not notified of her right to appeal the City's decision to demolish her residence, and that the structure had value and could be restored.

The Trial Court issued an Order granting the temporary injunction and set a permanent injunction hearing for September 5, 2000. After such hearing, the Trial Court determined that it was bound by its April 19, 2000 Order, and determined that Stacey was not entitled to a hearing before the Board because no timely appeal was filed. Thereafter, the Trial Court entered a Decree Nisi dissolving the temporary injunction. Stacey attempted to file a Notice of Appeal and Application for Stay with respect to the September 5, 2000, Decree. The Notice of Appeal was returned by the Prothonotary and the Application for Stay was denied by the Trial Court, as the Decree was interlocutory and not final and appealable. On September 18, 2000, Stacey filed timely exceptions to the Trial Court's decree and on November 6, 2000, the Trial Court entered an Order affirming its prior Decree. On November 7, 2000, the City demolished the structure. Thereafter, on December 4, 2000, Stacey appealed the Trial Court's Order affirming its decree to the Commonwealth Court of Pennsylvania.

The Commonwealth Court, in an opinion issued November 8, 2001, which is appended to Stacey's Petition for Writ of Certiorari, first concluded that Stacey was unable to appeal the Board's decision that her structure was an attractive nuisance, unsafe for human habitation, littered with rubbish or garbage, and uncontrolled weed growth, and in danger of collapse as Stacey did not appeal the Trial Court's April 19, 2000 Order, which affirmed the Board's determination. Such failure to appeal precluded her from challenging such determination in a later proceeding. (Pet. Appendix A at 5). Moreover, the Commonwealth Court concluded that the Trial Court had properly ruled, at the September 5, 2000 Injunction Hearing, that demolition of the structure was the appropriate remedy. (*Id.* at 11-12). In reaching such a conclusions, the Commonwealth Court first found that Stacey was well aware of her right to appeal the City's Notice of Demolition, however, she did not do so, and in fact, requested an extension of time to make repairs to the structure. (*Id.* at 5-6). Thus, Stacey was not entitled to hearing on the issue of demolition. (*Id.* at 6). Secondly, the Commonwealth Court held that Stacey was on notice as early as 1997 that her structure was in violation of the City's Property Maintenance Code and despite such awareness, did not make any substantial repairs to bring the structure up to code. (*Id.*). Moreover, because Stacey failed to provided documentation evidencing compliance with Section 107.5 of the BOCA Code, relating to transfer of ownership, of a property in limited circumstances, there was no merit to Stacey's claim that the City denied her the right to sell her property. (*Id.* at 6-7).

The Commonwealth Court also rejected Stacey's contention that the City denied her access to the structure to remove her personal items prior to demolition. (*Id.* at 7).

The Court considered the facts that: (1) the City informed Stacey on June 1, 2000 that demolition would ensue if the required repairs were not made; (2) the City informed Stacey that she had until August 17, 2000 to remove personal items; and (3) Raymond Stacey testified that he was given the opportunity to remove personal items and was at the property, according to his testimony, weekly, if not daily, despite the fact that the structure had been boarded and padlocked. Therefore, Stacey's argument that she did not have opportunity to retrieve her personal items from the structure before demolition was without merit. (*Id.*) The Commonwealth Court rejected Stacey's argument that the City acted somehow improperly by razing the structure following the Trial Court's denial of her exceptions to its decree. The Court held that it was evident that Stacey was afforded due process throughout the proceedings, availed herself of the legal avenues available to her, and was aware in June, 2000 that demolition would occur if the required repairs were not made. (*Id.*) Finally, the Commonwealth Court rejected Stacey's contention that the Trial Court erred in determining that her structure required demolition because it was a nuisance and was unsafe. There was sufficient evidence that Stacey had many opportunities to make the necessary repairs to the structure, but failed to do so. Given the entire period involved from 1997 through August 2000, it was evident that the record supported the Trial Court's finding that Stacey desired to sell the property rather than make the necessary repairs. (*Id.* at 8-9).

Subsequent to the decision of the Commonwealth Court as aforesaid, Stacey applied for Reconsideration and such Reconsideration was denied by Order of the Commonwealth Court dated January 28, 2002. (*See* Pet. Appendix A at 14). On July 10, 2002, Stacey's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied and on September 24, 2002, Stacey's Application for Reconsideration of Allowance

of Appeal to the Supreme Court of Pennsylvania was also denied. (*See* Pet. Appendix A at 15-16). On November 6, 2002, Stacey[1], along with her son Raymond Stacey, filed a civil action pursuant to 42 U.S.C. 1983 against, *inter alia*, the City, various City employees, and the Trial Court, in the United States District Court, Western District of Pennsylvania, alleging violation of civil rights based upon the same conduct and legal issues alleged in her instant Petition. (A copy of the Complaint in *Stacey v. City of Hermitage, et al*, No. 02-CV-1911, is attached hereto as Appendix "A").

REASONS FOR DENYING THE WRIT

Stacey's Petition for Certiorari should be denied for four (4) discrete reasons.

A. Certiorari is unwarranted because issues raised by Stacey in her Petition for Writ of Certiorari were not raised, litigated, or preserved before the Trial Court, Commonwealth Court of Pennsylvania, or Pennsylvania Supreme Court

Stacey claims that "Constitutional issues were raised" before the trial court, Commonwealth Court of Pennsylvania, and Pennsylvania Supreme Court. (Pet. at 8-9).

Ordinarily, this Court will not decide questions not raised, litigated, or preserved in the lower courts. *City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 259 (1987), *reh'g den.*, 481 U.S. 1033 (1987); *see also Equal Employment Opportunity Comm'n v. Fed. Labor Relations Auth.*, 476 U.S. 19, 24 (1986);

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1. The Complaint in the pending civil action is signed by Raymond Stacey, attorney in fact for Helen Stacey, as well as by Raymond Stacey, individually.

Oklahoma City v. Tuttle, 471 U.S. 808, 814-15 (1985), *reh'g den.*, 473 U.S. 925 (1985) (Respondent waived preservation objection where it did not bring the issue to the Court not later than the brief in opposition to petition for certiorari).

In her Statement of Matters Complained Of, filed with respect to the Trial Court's November 6, 2000 Order, Stacey complained, *inter alia*, that the Trial Court "erred in not determining that the use of the City of Hermitage Police Powers was arbitrarily and capriciously applied to" her.[2] (Stacey Stat. Of Matters Compl. Of at 2). Similarly, in her brief to the Commonwealth Court, Stacey framed the issue as "WHETHER THE CITY'S ARBITRARY AND CAPRICIOUS ACTIONS IN CONTROLLING AND THEN DEMOLISHING THE PROPERTY CONSTITUTE A TAKING IN VIOLATION OF THE CONSTITUTION OF PENNSYLVANIA." (Stacey Commw. Ct. Brief at 15). At no point during the appeal to the Commonwealth Court did Stacey make a Fourth Amendment Argument. Moreover, the Commonwealth Court did not address any constitutional arguments, whether based upon the Pennsylvania Constitution or the United States Constitution in its Opinion of November 8, 2001.[3] Stacey's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania and her subsequent Application for Reconsideration do not raise the Fourth Amendment issue.

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2. Although Stacey averred, in the Statement of Matters Complained Of, that she suffered a taking of property at the hands of the City, and thereby was denied due process, she does not frame such averment as a matter of which she complained. (*See* Stat. Of Matters Compl. Of at 2).

3. The Commonwealth Court, after restating that Stacey had appropriate notice of all proceedings and had, on multiple occasions, exercised her right to appeal, held: "It is evident that Stacey was afforded due process throughout the proceedings and availed herself of the legal avenues available to her." (Pet. Appendix A at 6).

At no time prior to her Application for Reconsideration to the Commonwealth Court did Stacey raise the issue of a violation of her right to due process of law based upon allegations that the "trial judge and lower court clerk"[4] failed to process her notice of appeal.[5] Further, although Stacey appended the language of the Fourteenth Amendment to her Petition for Allowance of Appeal to the Pennsylvania Supreme Court, no argument relating thereto was made within. (*See* Stacey Pet. Allow. Appeal at 1).

Because Stacey neither raised initially upon appeal nor thereafter preserved the Fourth and Fourteenth Amendment issues, and because such issues were not litigated before the Trial Court or the Pennsylvania appellate courts, Stacey cannot properly raise them before this Court. Furthermore, as set forth below in C., Stacey has filed, in the United States District Court, Western District of Pennsylvania, a civil action pursuant to 42 U.S.C. § 1983 against, *inter alia*, the City, various City employees, and the Trial Court alleging violation of civil rights based upon the same conduct and legal issues alleged in her Petition. Thus, as Stacey has not previously raised, litigated, or preserved the issues in this matter, and because she has elected to pursue such issues another, pending case, such issues cannot be presently addressed by this Court.

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4. In Pennsylvania, the civil clerk for the Courts of Common Pleas is the office of the Prothonotary.

5. Raymond Stacey alluded to the issue in his Reply Brief of Amicus Curiae in Support of Appellant's Position, although he did not brief the same therein. (*See* Reply Brief of Amicus Curiae at 1).

B. Certiorari is unwarranted because the City's seizure and demolition of Stacey's property is not violative of the Fourth and Fourteenth Amendments where it occurred after the determination of the Board that the property was a nuisance, and after Stacey availed herself of the process of legal review available pursuant to the relevant City ordinances and Pennsylvania law

Stacey claims that her petition should be granted because the demolition of her property "without specific warrant, judicial process or emergency" amounts to a violation of her rights under the Fourth and Fourteenth Amendments to the United States Constitution. (Pet. at 8).

In fact, it has been held that a city's seizure and demolition of buildings, after such buildings were condemned in accordance with city ordinance and state law, was reasonable under the Fourth Amendment. *Freeman v. City of Dallas*, 242 F.3d 642, 654 (5th Cir. 2001), *cert. denied*, 534 U.S. 817 (2001). *Freeman* involved a situation in which owners of vacant apartment buildings brought suit against the City of Dallas, under 42 U.S.C. § 1983, alleging that the city's destruction of the buildings as urban nuisances based upon finding s of the city's Urban Rehabilitation Standards Board was violative of, *inter alia*, the Fourth and Fourteenth Amendments. *Id.* at 647. The city cited the owners for non-compliance with the city's Minimum Urban Rehabilitation Standards Code, and, when the violations were not corrected, the matter was referred to the Standards Board, which mailed notices of hearing to the owners.[6] *Id.* at 645-46. After the

6. The notice of hearing indicated that the owners had the opportunity to present witnesses and evidence and that demolition could be ordered to remedy the code offenses. *Freeman*, 242 F.3d at 645-46.

hearing, at which Freeman appeared and presented evidence and testimony, the Standards Board thereafter voted unanimously to demolish the buildings as urban nuisances. *Id.* at 646. Freeman thereafter requested and received a rehearing, before which, members of the Standards Board visited and inspected the buildings. *Id.* At the rehearing, Freeman submitted further evidence and testimony, and again the Standards Board voted to demolish the buildings. *Id.* The owners did not avail themselves of their right to appeal the Standards Board's decision to the appropriate state court. *Id.* at 646-647. The owners failed to demolish the buildings within the required period, and the city hired a contractor to perform the works, assessing the cost of demolition against the owners. *Id.* at 647. One and one-half years later, the owners brought suit against the city. *Id.*

The Fifth Circuit Court, upon rehearing en banc, held that, while the condemnation and demolition as urban nuisances constituted a seizure for purposes of the Fourth Amendment, it was reasonable, despite the city's failure to obtain a warrant to enforce the demolition order. Such holding was based upon: (1) recognition that the establishment of minimum property maintenance standards to protect the public was reasonable; (2) the presence of an adequate administrative process of which the owners availed themselves; (3) the possibility of state court review; (4) the inability of the Standards Board to act with unfettered discretion; (5) the existence of a warrant is not required for a reasonable seizure under the Fourth Amendment; and (6) the owners' expectations of privacy in nuisance buildings was substantially diminished after the remedial orders became final.

Presently, Stacey was aware of and utilized the legal process available to her. Indeed, she brought appeals at each level of the proceedings: to the Board, to the Trial Court, to the Commonwealth Court, and to the Pennsylvania Supreme Court. Per *Freeman*, the City's seizure and demolition of Stacey's structure, after such structure condemned in accordance with BOCA Code and state law, was reasonable under the Fourth Amendment. *Freeman*, 242 F.3d at 654. Throughout the proceedings, the City and Board acted in accordance with the provisions of the BOCA Code, Pennsylvania Law, and the relevant Court orders. The fact that the City, Board and courts reached decisions unfavorable to Stacey does not render the demolition of her structure unreasonable.

Moreover, per *Freeman*, Stacey's argument that a warrant was required before seizure and demolition is without merit. *Freeman*, 242 F.3d at 653. Stacey relies upon *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967), in support of this argument. (Pet. at 10). However, *Camara* is distinguishable as it extended the warrant requirement to administrative inspections to verify compliance with municipal health and safety codes. *Freeman*, 242 F.3d at 650-51. Here, as in *Freeman*, evidence of code violations had already been obtained by means unchallenged by Stacey. *Id.* at 651. ("What is sought by [petitioners] is not protection from an unregulated search for wrongdoing, but additional protection to forestall the result of an already determined wrongdoing.") Therefore, *Camara* does not support a warrant requirement following a completed nuisance abatement procedure. *Id.*

Stacey also contends that the seizure and demolition of her structure amounts to a denial of due process. (Pet. at 8). Generally, pursuant to the Due Process clauses of the Fifth and Fourteenth Amendments, individuals must receive notice and opportunity to be heard before the government deprives them of property. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (citing *United States v. $8,850*, 461 U.S. 555, 562 n.12 (1983); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972), *reh'g den.*, 409 U.S. 902 (1972); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1969) (Harlan, J. concurring); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); *see also Maguire v. Reardon*, 255 U.S. 271, 272-73 (1921) (Demolition or removal of building erected in violation of city charter and ordinances does not violate Constitutional protections); *cf. GM Leasing Corp. v. United States*, 429 U.S. 338, 352 n.18 (1977) (Where seizures are sustainable under the Due Process Clause, analysis under the Fourth Amendment "is similar and yields a like result"). As set forth above, Stacey availed herself of a hearing before the Board and then the Trial Court regarding the City's determination of violations. Thereafter, Stacey received notice that demolition would occur if she failed to cure the structure's defects. Although the opportunity to appeal the notice of demolition was available, Stacey did not do so. Instead, she requested an extension of the cure period, and then petitioned for a temporary injunction. These facts are indicative that due process was afforded Stacey throughout the proceedings. The fact that, through the appeal process, the City, Board and courts reached decisions unfavorable to Stacey does not render the demolition of her structure a violation of due process protections.

C. Certiorari is unwarranted because the Trial Court and Mercer County Prothonotary neither "unlawfully altered" nor "refus[ed] to process" Stacey's Notice of Appeal

Stacey claims that the Trial Court and Prothonotary altered Stacey's Notice of Appeal, resulting in a denial of her right to dues process of law guaranteed by the Fourteenth Amendment.

The relevant provision of the Pennsylvania Rules of Appellate Procedure provides that a "A decree nisi granting or denying an injunction is not appealable as of right . . . unless the decree nisi . . . dissolves a previously granted preliminary injunction *effective upon the entry of a decree* nisi." Pa. R.A.P 311(a)(4)(ii) (emphasis added). As set forth above, the Trial Court entered an interlocutory Decree Nisi on September 5, 2000 dissolving the preliminary injunction. As the Decree was interlocutory, the dissolution of the preliminary objection was not effective upon entry of the Decree and was not appealable as of right. Stacey, through counsel, filed timely Exceptions. Before the Decree became final and appealable, Stacey, again through counsel, filed both an Application for Stay, which the Trial Court denied as its Decree was interlocutory, and attempted to file a Notice of Appeal, which was inadvertently time stamped by an employee of the Prothonotary but not entered upon the docket. Realizing that the filing of the Notice of Appeal was premature, as the Decree was not final and appealable, the Prothonotary notified Stacey's counsel of the error and returned the Notice of Appeal. Thus, any error is attributable to Stacey's counsel, and Stacey's claim is without merit.

D. Certiorari is unwarranted because the issues raised by Stacey in her Petition are the subject of an ongoing civil action in the United States District Court for the Western District of Pennsylvania

As set forth in A., *supra*, Stacey's Fourth and Fourteenth Amendment issues were not raised, litigated or preserved before the Trial Court or Pennsylvania appellate courts. Further, Stacey has initiated a 42 U.S.C. § 1983 action against the City, various city employees, the Trial Court and Mercer County Prothonotary based upon the same conduct alleged and same issues raised in her Petition. (*See* Stacey Complaint at ¶¶31, 34, 37, 40, 42, 52-58). As these issues were not properly raised in the present appeal, and because such issues are the subjects of litigation pending before another court, it would be improper for this Court to address them presently.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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